DATE: FEBRUARY 19, 1998

CASE NO: 97-SDW-7

In the Matter of:

ADRIENNE ANDERSON,
Complainant,

v.

METRO WASTEWATER
RECLAMATION DISTRICT,
Respondent.

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This matter arises under the employee protection provisions of the Comprehensive Environmental Response, Compensation and Liability Act ("CERLA"), 42 U.S.C. §9610, the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. §6971, the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. §1367, and the Energy Reorganization Act ("ERA"), 42 U.S.C. §5851, and the regulations promulgated thereunder and contained at 29 C.F.R Part 24.[1] It arises from numerous complaints filed by Adrienne Anderson, Complainant, against Metro Wastewater Reclamation District, Respondent.

Procedural Background

[1]The Office of Administrative Law Judges' case number (97-SDW-7) erroneously notes this case as one arising under the employee protection provision of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §300j-0(i). As previously found, the denial of Complainant's claim under the SDWA was not appealed, and therefore, this statute is not in issue herein. However, for the purposes of administrative efficiency, the case number will not be changed.

On May 2, 1997, Complainant, Adrienne Anderson, filed a complaint with the U.S. Department of Labor, alleging that Respondent had taken retaliatory actions against her for having performed protected activities under the employee protection provisions of the above-cited statutes.

In a letter dated June 6, 1997, David W. Decker, Regional Supervisory Investigator for the Occupational Safety and Health Administration ("OSHA"), informed the parties of the results of an investigation. In regards to the claims under the CERCLA and the SWDA, OSHA determined that discrimination was a factor in the actions comprising the complaint, and thus Complainant's allegation that discriminatory actions did occur in violation of those two acts was substantiated.

In regards to relief and remedy, OSHA found that Respondent was required to publically rescind letters from Respondent to Complainant dated April 16, 1997, and May 20, 1997, and to make clear in the record that Respondent and its Board cannot discriminate against employees and the representatives of employees for participation in activities protected under those acts.

However, OSHA did not find merit to the complaints under the SDWA, the CAA, and the TSCA because those acts do not provide protection for representatives of employees. Furthermore, no merit was found in the ERA claim, since Respondent is not an "Employer" as defined in that act, nor does the act provide protection for representatives of employees.

In a letter addressed to the Office of Administrative Law Judges ("OALJ") dated June 11, 1997, Counsel for Respondent appealed the OSHA determination and requested a hearing before an administrative law judge. Specifically, Respondent appeals the remedy ordered, and the applicability of the CERCLA, the SWDA, and the FWPCA.

In a letter dated June 12, 1997, Complainant appealed the denial of the claim under the ERA, and the remedy and relief awarded to Complainant under the CERCLA, the SWDA, and the FWPCA. Complainant did not appeal the denial of her claims

filed under the Safe Drinking Water Act ("SDWA"), the Clean Air Act ("CAA"), and the Toxic Substances Control Act ("TSCA").

This matter was assigned to the undersigned administrative law judge on June 18, 1997. On June 19, 1997, the undersigned issued a Notice of Hearing and Prehearing Order, wherein notice was given to the parties that this matter was tentatively set for hearing on July 7, 1997, at Denver, Colorado. However, if the parties were willing to waive the time constraints associated with employee protection claims, the undersigned was willing to convene a prehearing conference in lieu of a formal hearing.

On June 23, 1997, this office received via facsimile Employer's waiver of time constraints and request that the July 7, 1997 hearing date be utilized as a prehearing conference. On June 25, 1997, this office received Complainant's Notice of Waiver and Request for Continuance. Complainant, who was not represented by an attorney at that time, requested a continuance so that she could obtain counsel.

On June 27, 1997, the undersigned issued an Order Granting Continuance and Retaining Jurisdiction, Amended Notice of Prehearing Conference and Amended Prehearing Order, whereby this matter was scheduled for a prehearing conference on August 11, 1997.

This office received a facsimile from Counsel for Respondent on July 1, 1997. Due to conflicting family obligations, counsel requested that the prehearing conference be rescheduled and set for another date in August. On July 7, 1997, this office received a facsimile from Complainant objecting to the rescheduling of the prehearing conference.

On July 10, 1997, the undersigned issued an Amended Notice of Prehearing Conference and Amended Prehearing Order, rescheduling the prehearing conference to August 7, 1997, at Denver, Colorado.

On August 5, 1997, this office received a facsimile from David J. Marshall, Esq., of the law firms Bernabei & Katz and Provost & Umphrey, informing the undersigned that he had been retained by Complainant to represent her in this matter.

Counsel for Complainant also submitted a Notice of Appearance and a Motion for Continuance, wherein Complainant requested an extension of time in order to comply with Respondent's discovery requests, and a postponement of Complainant's deposition scheduled for August 9, 1997.

This office received Respondent's Response to Complainant's Motion for Continuance on August 6, 1997, via facsimile. Respondent requested that a continuance be denied because Complainant failed to file a request for a continuance prior to the fourteen days preceding the date set for hearing, as required by 29 C.F.R. §18.28.

On August 6, 1997, the undersigned issued an Order Granting Continuance and Retaining Jurisdiction, Protective Order, Amended Notice of Prehearing Conference, and Amended Prehearing Order. The undersigned determined that Complainant's retention of legal counsel constituted "good cause" pursuant to 29 C.F.R. §18.28 to grant a continuance, and this matter was rescheduled for prehearing conference on September 17, 1997. The undersigned also ordered that Complainant respond to Respondent's Interrogatories and Request for Production of Documents on or before September 9, 1997, and that Complainant's deposition be rescheduled for after September 25, 1997.

On September 2, 1997, this office received Complainant's Motion to Preserve Evidence, wherein Complainant requested that Respondent preserve all tape recordings it makes of any Board of Director meetings and committee meetings. Respondent's response to said motion was received by this office on September 9, 1997.

On September 10, 1997, this office received a letter from Complainant's Counsel wherein Complainant requested that the prehearing conference be convened telephonically.

The undersigned issued an Order Re: Prehearing Conference and Interim Order Re: Discovery Issues on September 10, 1997. After reviewing Complainant's Motion to Preserve, the undersigned deemed it appropriate to receive oral argument on this issue at the time of the September 17, 1997 prehearing conference, and then issue a ruling from the bench. In the

interim period, Respondent was ordered to preserve all tape recordings of meetings in its possession or recordings of such meetings which may take place between the date of the Order and the prehearing conference. Finally, Complainant's request for a telephonic conference in lieu of a live prehearing conference was denied.

On September 15, 1997, Respondent filed its Motion for Protective Order, seeking an order limiting the scope of Complainant's discovery requests to Respondent's conduct during or near April of 1997. Respondent also asked that the costs of any document reproduction sought by Complainant be paid for in advance. Due to the proximity of the prehearing conference, Counsel for Complainant had no opportunity to file a written response to the motion, but did have the opportunity to review the Motion prior to the prehearing conference. (TR. 78)

Pursuant to the Amended Notice of Prehearing Conference issued on August 6, 1997, the undersigned administrative law judge convened a prehearing conference in this matter on September 17, 1997, at Denver, Colorado. Complainant was represented by David J. Marshall, Esq., while Respondent was represented by Richard P. Brentlinger, Esq., and Joel A. Moritz, Esq. Respondent's Prehearing Exhibit 1 was received by the undersigned, as were both parties' prehearing statements, which were filed in accordance with the undersigned's August 6, 1997 Order. The pertinent events of the prehearing conference are summarized below:

Allegations of Continuing Violations

In the prehearing statement, as well as during the prehearing conference, Complainant's counsel alleged that Respondent had engaged in a continuing course of unlawful retaliation against Complainant. (TR. 48-49) Respondent's counsel objected to these allegations, arguing that his client was entitled to notice of any specific actions since April of 1997 which Complainant alleges constitute unlawful retaliation. (TR. 50)

The undersigned agreed that Respondent is entitled to adequate notice of all allegations made by Complainant. Therefore, based upon the agreement of the parties, the

undersigned granted Complainant's counsel a period of thirty (30) days from September 17, 1997, in which to file a written statement setting forth, with specificity, the acts which Complainant alleges constitutes continuing retaliatory conduct. (TR. 51, 106) Respondent was given an additional thirty (30) days in which to file any written response to Complainant's statement. (TR. 75, 106)

On October 2, 1997, this office received Complainant's Amended Pre-Hearing Statement in response to the undersigned's Order of September 17, 1997, that Complainant file a statement clarifying her allegation of Respondent's "continuing violation" of her rights.

Complainant's Motion to Preserve Evidence

During the course of the prehearing conference, counsel for both parties did in fact present oral argument on this issue. (TR. 60-74) After much discussion, Respondent's counsel agreed that such tapes are discoverable under the Federal Rules of Civil Procedure if Complainant does in fact allege continuing retaliatory acts. (TR. 75)

Based upon this concession, the undersigned agreed to leave the September 10, 1997 Order in effect until receipt of Complainant's statement concerning these continuing retaliatory acts and Respondent's response thereto. (TR. 75-76) After receipt of those documents, and consideration thereof, the undersigned stated that he would issue a ruling upon the preservation and discoverability of any tape recordings.

Respondent's Motion for Protective Order

During the course of the prehearing conference, counsel for both parties did in fact present oral argument on this issue. (TR. 79-102) After much discussion, the undersigned agreed with Respondent's assertion that Complainant's discovery requests exceed the scope of what she is entitled to in this type of matter. (TR. 99) Therefore, the undersigned granted Complainant's counsel a period of thirty (30) days from September 17, 1997, in which to file an amended document for production of documents. (TR. 106) Respondent was given an additional thirty (30) days in which to file any written

response to Claimant's statement (TR. 106)

After Complainant has amended her discovery request and as Respondent is preparing to respond, the parties were instructed to attempt to reach an agreement on a proposed protective order. (TR. 110) After receipt of those documents, and consideration thereof, the undersigned stated that he would issue a ruling upon Respondent's motion that the costs of any document reproduction sought by Complainant be paid for in advance. (TR. 112)

Furthermore, all depositions in this matter were to be cancelled until the issue of Complainant's discovery request was resolved. (TR. 103, 107) No discovery schedule would be set until such time as both the scope of discovery and the scope of deposition were established. (TR. 112)

Respondent's Request for Production of Documents

Counsel for Respondent had previously served upon Complainant's Counsel a request for the production of documents and items, involving audio tapes of the Board of Directors meetings in the possession of Ms. Anderson. (TR. 115) During the course of the prehearing conference, the parties agreed that Ms. Anderson would make these tapes available to counsel for the Respondent by September 22, 1997. (TR. 115) Counsel for Respondent was instructed to identify the taped proceedings by number, and make arrangements for the reproduction of said tapes. (TR. 166)

Post-Hearing Events

Complainant's Amended Pre-Hearing Statement was received by this office on October 2, 1997. On October 5, 1997, this office received Respondent's Response to Claimant's Amended Pre-Hearing Statement.

On October 15, 1997, this office received Complainant's Second Set of Interrogatories and Request for Production of Documents for filing. On October 22, 1997, this office received a facsimile from Complainant's Counsel. Counsel stated that counsel for both parties still could not agree on the scope of discovery in this matter, and therefore requested

a telephonic conference with the undersigned to address this issue.

Respondent's Motion for Summary Decision[2]

On December 1, 1997, this office received Respondent's Motion for Summary Decision, wherein Respondent requests that the Complaint be dismissed since Complainant is not an "employee" nor an "authorized representative" of the employees of Metro, as is expressly required under the applicable Federal Statutes under which she seeks whistleblower protection.

Complainant was appointed to the Respondent's Board of Directors ("Metro") in June of 1996. Complainant alleges in her Complaint that her appointment was clothed "with the specific charge to represent the interest of the sewage plant workers." Respondent states that it is undisputed that Complainant is not an "employee" of Metro, and thus her standing can only be achieved as an "authorized representative" of Metro.

Respondent asserts that Complainant has failed to produce any documentation supporting her status as "authorized representative" of the employees of the Oil, Chemical and Atomic Worker's International Union (hereinafter the "OCAW") or any other employee group employed by Metro.

Respondent further states that since the statutes at issue do not define, and no case law under these statutory provisions, has interpreted the phrase "authorized representative", the plain meanings of the words must be examined. Black's Law Dictionary, 4th Edition, construes

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[2]The following abbreviations will be utilized herein: "Tr." for the transcript of the September 17, 1997 prehearing conference; "RX" for exhibits attached in support of Respondent's Motion for Summary Decision; "CX" for exhibits attached in support of Complainant's Opposition to Motion for Summary Decision, and "RX2" for exhibits attached in support of Respondent's Reply to Complainant's Opposition to Motion for Summary Decision.

"Authorized" as "permitted or "directed," indicating merely possessed of authority, and a "Representative" as "one who stands in place of another."

Respondent contends that Complainant has not alleged that any of the 323 employees of Metro directed or gave authority to Complainant to stand or act on their behalf, and approximately half of Metro's employees have already chosen their "authorized representative" through a union election.

Moreover, Respondent asserts that the motive behind Complainant's appointment to the Metro Board, the fact that Complainant at one time worked for the OCAW Union, and the fact that certain individual members of the OCAW may view her as their voice on the Board are all irrelevant in determining whether or not Complainant is an "authorized representative" of the Metro employees.

Respondent contends that as one of twenty representatives of Denver on the fifty-nine member Metro Board, Complainant represents, like the other members, solely the interests of the City of Denver. Respondent asserts that absent evidence the Complainant has been chosen by the employees of Metro to be their representative, Complainant has no standing to maintain a whistleblower action under the statutes at issue. Therefore, Respondent requests that summary decision be entered in this matter pursuant to 29 C.F.R. §18.40.

On December 4, 1997, the undersigned issued an Order to Show Cause, wherein Complainant was ordered to show cause, if any, why summary decision should not be entered against her for lack of standing to maintain an action under the statutes at issue. Complainant's response was to be filed in the office of the undersigned not later than December 15, 1997.

Complainant's Opposition to Respondent's Motion

On December 15, 1997, this office received Complainant's Opposition to Respondent's Motion for Summary Decision. Complainant contends that she has shown, at the very least, that genuine issues of material fact exist regarding her standing to bring her complaint, and thus summary decision should not be entered in this matter.

Complainant asserts that she was appointed to the Metro Board of Directors to represent labor interests, and since taking office as a Board member, she has functioned as the authorized representative of OCAW Local 2-477 members and that the OCAW has authorized her to raise issues regarding the OCAW's health and safety concerns on the Board.

Furthermore, Complainant asserts that she takes her direction from the union leadership and membership on other issues affecting their interest, attends local union meetings, and that her efforts have drawn expressions of gratitude from OCAW members and their leadership. Complainant asserts that Metro management and its Board leadership have viewed Complainant as its representative of OCAW 2-477, and that this authority derives from the power of the elected leadership to delegate authority to her.

Complainant further asserts that if afforded the opportunity to engage in discovery, she will uncover further evidence of her status as an "authorized representative, so that granting summary decision against her at this point would be grossly unfair.

In support of her Opposition to Motion for Summary Decision, Complainant has attached the following: the affidavit of Complainant Adrienne Anderson (CX-1) and its attachment 1; the affidavit of Marilyn Y. Ferrari (CX-2) and its attachments 1 through 4; the affidavit of Donald S. Holstrom (CX-3); the affidavit of L. Calvin Moore (CX-4); documents concerning two other nominees for appointment to the Board (CX-5); a letter to Chairman Hackworth from Complainant dated August 16, 1996 (CX-6); a letter from Chairman Hackworth to Complainant dated September 3, 1996 (CX-7); Operations Committee Meeting Minutes from December 5, 1996 (CX-8); and a portion of the transcript from the prehearing conference held in this matter before the undersigned on September 17, 1996 (CX-9).

Respondent's Reply to Complainant's Opposition to Motion for Summary Decision

This office received Respondent's Reply to Complainant's Opposition to Respondent's Motion for Summary Decision on January 5, 1998. In addition to the arguments previously

contained in its Motion for Summary Decision, Respondent contends that Complainant has provided no evidentiary support for her allegations that she functioned as the authorized representative on the Metro Board of the OCAW members.

Respondent further asserts that at no time was Metro management aware that it should be dealing with Complainant on any matters that affected the Union. (RX-B, RX2-A) Rather, in response to concern over her pro-union background and voting on union matters, the minutes of a December 5, 1996 Operations Committee meeting provide that:

> Director Anderson clarified that she does not now nor did she when she was appointed to the Metro District Board of Directors, work for the Oil Chemical & Atomic Workers Union. (CX-8, p. 3)

Thus, Respondent contends that Complainant has taken the position that she does not work for the OCAW when it is to her benefit, but does work for the OCAW when arguing for standing to maintain this complaint.

Furthermore, Respondent asserts that Complainant's participating and voting in discussions on OCAW matters would be a direct violation of Metro's By-Laws regarding conflict of interests. (RX2-B) Had Complainant believed herself to be an "authorized representative" of the OCAW, she should have recused herself from participating in discussions and votes involving the OCAW, but has never done so.

In summary, Respondent asserts that Complainant has produced no correspondence between herself and OCAW to support her status, nor any notice to the Union members or Metro, that she is an "authorized representative" of the OCAW, and that the self-serving affidavits of Donald Holstrom (CX-3) and Marilyn Ferrari (CX-2) lack credibility in the absence of documentary support.

DISCUSSION

The standard for deciding a motion for summary decision in a whistleblower case, derived from Fed.R.Civ.P. Rule 56, is

governed by 29 C.F.R. §§ 18.40 and 18.41. Summary decision is appropriate where: "the Court is satisfied 'that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" Celotex Corp. v. Cartrett, 106 S.Ct. 2548, 2556 (1986)(quoting Fed.R.Civ.P. 56) See also 29 C.F.R. §18.41.

The burden rests on the moving party to demonstrate the absence of a genuine issue of material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608 (1970). The court must view the facts, and all reasonable inferences drawn from those facts, in the light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986).

The SWDA, the CERCLA, and the FWPCA all provided that no person shall retaliate against "any employee or any authorized representative of employees" by reason of the fact that such employee or representative raised complaints or allegations of their employer's non-compliance with these environmental statutes. (42 U.S.C. §6971(a), 42 U.S.C. §9610(a), 33 U.S.C. §1367(a))[3]

At the Pre-Hearing Conference held in this matter on September 17, 1997, it was conceded that Complainant is not an "employee" of the District, and thus her standing to bring a whistleblower complaint under the applicable statutes must be achieved as an "authorized representative" of the employees. (TR. 13-14)

The undersigned is aware, and both parties agree, that neither the statutes nor the case law under these statutory provisions define or interpret the phrase "authorized representative". Thus, the plain meaning of the words must be examined. See U.S. v. Roberts, 88 F.3d 872, 877 (10th Cir. 1996)(common and ordinary usage of statutory terms may be

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[3]The ERA does not refer to "authorized representative," but provides that: "No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or person acting pursuant to a request of the employee) — ..." (42 U.S.C. §5851(a)(1)).

obtained by reference to a dictionary); Bowe v. SMC Elec. Products, Inc., 945 F.Supp. 1482, 1484 (D. Colo. 1996)(same).

Black's Law Dictionary, 4th Edition, states that "authorized" is sometimes construed as equivalent to "permitted" or "directed," and indicates "merely possessed of authority." A "representative" is "One who represents or stands in the place of another." When these two terms are combined, it is determined that the evidence, viewed in the light most favorable to Complainant, fails to prove that Complainant is an "authorized representative" of the OCAW, or any other employee group, while a member of the Metro Board.

The affidavits of Marilyn Y. Ferrari and Donald S. Holstrom would appear to be the strongest arguments to support Claimant's contention that she is an "authorized representative" under the applicable whistleblower statutes. Ms. Ferrari states that she was employed as a Laboratory Technician for Metro from 1975 until her retirement in 1997. She served as Vice President for OCAW Local 2-477 for several years prior to her retirement, and has been the OCAW representative to the Executive Board of the Denver Area Labor Federation from 1995 to the present. (CX-2, at 1)

Her affidavit further provides in pertinent part:[4]

> 15. As the Metro Board member representing us, Ms. Anderson has conducted extensive investigation of EPA and Colorado Department of Health files on the Lowry Landfill from June 1996 to the present, and has regularly reported her findings to us for action. Working on behalf of our members at Metro, she has reviewed hundreds of documents, many of which I have also reviewed. (CX-2, at 4)

[4]The undersigned would also note that Ms. Ferrari's affidavit contains numerous statements regarding alleged health and safety violations at Metro, specifically the Lowry Landfill project. Said allegations are irrelevant for the purposes of deciding this motion, and will be completely disregarded in the undersigned's present disposition.

> 18. Throughout her tenure as a Metro Board member, Adrienne Anderson has served as the authorized representative on that Board of OCAW Local 2-477's members who work at Metro. Our local leadership, including myself, have collaborated closely with her on an ongoing basis. We have on many occasions asked and directed her to act on our behalf in raising points before the Board, which she has done. She has attended our local meetings and has regularly reported to us on her investigation of the Lowry Landfill matter...I believe that the members of Local 2-477 who work at Metro, and many other Metro workers who do not belong to the OCAW, feel strongly that Ms. Anderson has played an important role in representing their interests on the Metro Board. (CX-2, at 5-6)

Donald S. Holstrom, President of OCAW Local 2-477, states that the leadership of Local 2-477 asked Complainant to serve as their representative on the Metro Board. Mr. Holstrom further states that:

> Since taking office as a Metro Board member, Ms. Anderson has served as the authorized representative on the Metro Board of Members Local 2-477 who work at Metro's sewage plant. She has taken our direction on issues to pursue before the Board, and has provided invaluable expertise and advice on health and safety matters. She has attended local union meetings, been an integral part of our discussions, and in general has worked in close collaboration with the local leadership and membership in our efforts to raise our concerns about worker health and safety..." (CX-3)

Also attached to Complainant's Response is the affidavit

of Complainant, Adrienne Anderson. Ms. Anderson states that:

> 21. I have acted, and continue to act, as an authorized representative of the OCAW workers at the Metro plant, whose positions on Metro matters have been strongly endorsed by the wider labor community...I have also received phone calls from other workers at the Metro plant (not represented by OCAW) in support of positions I have taken regarding the Lowry Landfill. (CX-1, at 5)

Complainant has also submitted the affidavit of L. Calvin Moore, the current Vice President of OCAW. Mr. Moore states that he has personal knowledge of the facts set forth in his affidavit, and that: "Ms. Anderson works closely with the OCAW local that represents Metro's laboratory workers, and it is my understanding from the local leadership that they have authorized her to represent their members in her role as a Director." (CX-4, at 2)

After review of this statement, the undersigned agrees with Respondent's assertion that Mr. Moore's statement is, in fact, not based on personal knowledge, and therefore must be stricken. It is well established that "a party may not rely upon inadmissible hearsay in an affidavit or deposition to oppose a motion for summary judgment." Patel v. Allstate Insurance Co., 105 F.3d 365, 367 at n. 1 (7th Cir. 1997); citing Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 562 (7th Cir. 1996). See also Thomas v. International Bus. Mach., 48 F.3d 478, 485 (10th Cir. 1995)(inadmissible hearsay testimony may not be included in an affidavit to defeat summary judgment).

Respondent has also asserted that if Complainant were in fact an "authorized representative" of OCAW, her participation and voting in discussions on matters affecting the OCAW that come before the Metro Board would be a violation of Metro's By-Laws regarding conflicts of interests. Section IX of the Metro Bylaws provide in pertinent part that:

> Section 1. **Refrain from Participation**.

> Any member of the Board who is present at a meeting at which is discussed any matter in which he has, directly or indirectly a personal or private interest, shall declare his interest and shall refrain from attempting to influence the decision of other members of the Board of Directors and shall not vote in respect to such matter. RX2-B)

Respondent has also submitted the affidavit of Richard J. Plastino, a member of the Board of Directors since May of 1989 to the present. Mr. Plastino states that during Complainant's tenure on the Metro Board, she has participated in discussions and voted on matters affecting the OCAW, at no time has recused herself from such discussions, and that this participation would be a violation of Bylaw XI were she in fact an "authorized representative" of the OCAW. (RX2-A)

Also attached is the affidavit of Robert W. Hite, who has served as District Manager of Respondent since 1988. Mr. Hite states that:

> 2. On December 16, 1997, I attended the regular monthly meeting of Metro's Board of Directors. One item on the agenda for that meeting was approval of Resolution #1297-6.f, regarding salary increases for District employees, including OCAW members. (A true and correct copy of proposed Resolution #1297-6.f is attached to this affidavit as Exhibit 1).
>
> 3. Complainant, Ms. Anderson, also attended the December 16, 1997 Board meeting and voted on the pay increase for all employees, including OCAW employees. Ms. Anderson voted against the proposed increase. (RX2-C, at 1)

The undersigned must agree with Respondent that Complainant's own actions have contradicted her alleged status as an "authorized representative." According to the Metro

Bylaws, Complainant's participation and voting on matters coming before the Board that would affect the OCAW would violate the bylaw regarding conflicts of interests.

Had Complainant been, or had she believed herself to be, an authorized representative of the OCAW in December of 1997, she should have recused herself from voting on a pay increase that would affect OCAW members, in order to avoid a conflict of interest. Thus, while Complainant states in her after-the-fact affidavit that she has acted as the authorized representative of the OCAW, her actions at past Board meetings indicate otherwise.

On further note, the Operations Committee Meeting Minutes from December 5, 1996, reflect the following:

> Director Sveum moved and Director Beckfeld seconded the motion to enter into Executive Session to discuss the administrative and union salary ranges.
>
> Director Anderson clarified that she does not now, nor did she when she was appointed to the Metro District Board of Directors, work for the Oil, Chemical, & Atomic Workers Union. (CX-8, at 3) [Emphasis Added]

Again, while Complainant now presents affidavits asserting her status as an "authorized representative" of OCAW, her own undisputed actions and statements prior to her whistleblower complaint and the present challenge to her standing, have conclusively demonstrated otherwise.

Furthermore, Complainant asserts that when she was appointed to the Metro Board of Directors in June of 1996, her appointment was clothed with the specific charge to represent the interests of the plant workers.

In the affidavit of Marilyn Ferrari, Ms. Ferrari states that she initiated discussions with Denver Mayor Wellington Webb's staff about getting a representative of Metro workers appointed to the Board, and the mayor's office subsequently

asked Ms. Ferrari to submit a resume from a chosen candidate. (CX-2) Ms. Ferrari asked Complainant to take on this role, which she accepted, (CX-1, CX-3) and then fellow OCAW leader Pat Farmer submitted Complainant's resume to the Board. (RX-C, at 11)

The undersigned has reviewed the letter from Pat Farmer to Donna Good, Office of the Denver Mayor, submitting Complainant's resume, and dated December 12, 1995. (RX-C, at 11) Pat Farmer states: "Please accept the enclosed resume of Adriene Anderson in consideration for the open position on the Metro Wastewater Reclamation District Board of Directors." Pat Farmer further states in pertinent part that:

> As a representative for the Metro OCAW bargaining unit, I have spoken with Mayor Webb and Paul Wishard about our struggles. The majority of our members are taxpayers in the City of Denver and we believe the Denver Directors have a duty to represent the citizens of this city. We hope the appointment of Board members like Adrienne Anderson will lead to a kinder and gentler District management who will put people and the environment first.

While Pat Farmer states that Complainant has "been helpful to the employees at the District" who are represented by OCAW in their contract bargaining, nothing in this letter uses any language indicating that Complainant's resume is being submitted as an "authorized representative" of OCAW or Metro employees. The only language used by Pat Farmer is far more general, in that Complainant's appointment is hoped to put "people" and the "environment" first, and that Directors have a duty to represent the "citizens" of Denver.

Furthermore, during the tape-recorded Denver City Council Public Works committee meeting on June 5, 1996,[5] the issue of Complainant's appointment came up for discussion. Ted Hackworth, a city councilman sitting on the Public Works

[5]Complainant asserts that said meeting was actually held on June 4, 1996, rather than June 5.

Committee and also Chairman of the Operations Committee of the Metro Board, expressed his concerns regarding Complainant's appointment.

According to the transcript of said meeting, which transciber Julie Lord has certified is a correct transcript from the electric sound recording of the matter, Complainant stated that:

> Ms. Anderson: — with respect to (inaudible) issues that as I understand from Mayor Webb's appointment that he does intend to be concerned in a rollover of the labor issues (inaudible). As so I — I currently would want to hear his testimony with regard to (inaudible) to (inaudible) concern there at the facility. But I don't see any potential harm (inaudible) with — with that aspect of that. (RX-2, at 7)

Complainant asserts that the transcript of this meeting is "riddled with inaccuracies", and that her affidavit points out these inaccuracies and sets forth actual quotes from meeting participants. Complainant's Counsel stated in his Opposition that he has not had time to have an accurate transcript prepared, and would forward the same to the undersigned and Respondent as soon as he could arrange to have it prepared. (See Complainant's Opposition, at p.8, n. 4) However, in a telephonic conversation with the undersigned's law clerk on February 4, 1998, Complainant's Counsel informed the law clerk that he had abandoned the intention to prepare and forward Complainant's version of the transcript.

In Complainant's affidavit, she states that the trascript "completely falsifies and distorts the actual proceedings," and that her actual statement was as follows:

> As I understand from Mayor Webb's appointment, that he does intend for me to serve in a role on the labor issues relative to that plant. And so I — I certainly would want to have input from the union workers as well as any non-union

> workers who are there at that facility. (CX-1, at p. 3)

As Complainant has chosen not to forward her version of the transript, and the undersigned has no reason to doubt the transcript certified as verbatim by Julie Lord, it is determined that Complainant's assertion of what happened are merely unsupported allegations with little probative evidentiary value.

Even assuming Complainant's version of her statement is correct, said statement does not prove her assertion that she is the "authorized representative" of OCAW or other employees at Metro. Complainant's understanding that her appointment to the Board was intended for her "to serve in a role on the labor issues relative to the plant" simply does not equate into an intent that she serve as the "authorized representative" of either union or non-union employees at Metro. Thus, the undersigned agrees with Respondent that Complainant's representative of workers' interest falls short of the statutory requirement that Complainant cannot simply claim to be representing the workers' interests, but that she be an "authorized representative" of Metro employees.

Furthermore, Complainant's assertion that Metro management and its Board leadership view Complainant as the representative of the OCAW (see Complainant's Opposition, p. 12) is also without evidentiary support. Specifically, Complainant has submitted two letters: the first, dated August 16, 1996, is from Complainant to Chairman Hackworth; the second (CX-6), dated September 3, 1996, is a response from Chairman Hackworth to Complainant. (CX-7)

These letters demonstrate that there is a conflict between Complainant and Ted Hackworth, a Denver City Councilman and Chairman of Metro's Operations Committee, regarding their perspectives on environmental and labor issues, and perhaps even genuine animosity, but do not support Complainant's position that other Board members view her as the representative of the OCAW.

In Complainant's letter, she accuses Chairman Hackworth of making derogatory, baseless, and defamatory statements about

her and other Board members concerning her appointment during an Operations Committee meeting in July of 1996. However, no where in this letter does Complainant refer to her status as an "authorized representative" of the OCAW. Her statements in the letter are far more broad concerning her role on that Board, in that Complainant states:

> While it is apparent we have different perspectives on important environmental, labor, and other issues facing the Metro Wastewater Reclamation District, one would expect that Metro's leadership support the need for diverse representation to assure that Metro's policies are fully defensible, and in the public interest. Clearly, there has been a dearth of representation to the Metro Board from the occupational and environmental health sectors in the past; Mayor Webb is wisely seeking to provide greater representation of these interests on behalf of Denver's residents and sewage system ratepayers in recent appointments. Let me assure you that I take my own appointment in this regard very seriously, with consideration for the short and long-range fiduciary responsibilities this position also requires. (CX-6, at 2)

Thus, Complainant refers to her appointment on the Board as one providing representation of occupational and health interests, and on behalf of Denver's citizens and ratepayers. This statement is a far cry from indicating that Complainant was the "authorized representative" of the OCAW or Metro employees, or that Metro management and Board leadership view her as such, and thus provides no support for her status as an "authorized representative."

The response to Complainant by Chairman Hackworth also lends no support to Complainant's position. In regards to statements made during the Public Works Committee meeting of the Denver City Council, Chairman Hackworth states that:

> I believe you stated that you had no

> attachment to the OCAW as a result of being employed by them at the time. You further stated that you believed in fair labor practices. In response to my concern about you being an environmental extremist, you stated that you were a person concerned about the environment, but did not view yourself as an extremist. [Emphasis Added]

As Respondent points out, Complainant's exhibits do not provide any documents responding to or refuting this statement. Chairman Hackworth's correspondence does not demonstrate that he viewed Complainant as the "authorized representative" of Metro; rather, the emphasized portion of his statement indicates exactly the opposite: Complainant had no attachment to the OCAW, and was not employed by them at that time.

In support of its Reply, Respondent has also attached the affidavit of Richard J. Plastino, who has been a member of the Metro Board since May 1, 1989, until the present, and served as Chairman of the Metro Board from July of 1995 until July of 1997. (RX2-A). Mr. Plastino states that:

> 4. That during Adrienne Anderson's tenure on the Metro Board of Director commencing July 16, 1996, at no time have I been advised by her or Denver Mayor Wellington Webb or any representative of Mr. Webb's office of the OCAW that Ms. Anderson was the "authorized representative" of the OCAW Union member employees of Metro. (RX2-A, at 1)

Thus, Respondent states that Metro only learned of Complainant's asserted "authorized representative" status between Complainant and the OCAW through Complainant's filing of the present complaint, and Metro management at no time was aware that it should be dealing with Complainant on any matters that affected the Union.

Complainant also asserts that Metro District Manager Robert Hite has "made no secret of his understanding that Ms. Anderson represents these employees with whom he has had a

long-running collective bargaining dispute." (See Complainant's Opposition, at 12-13) Specifically, Complainant notes that: "Metro has admitted, for example, that when Ms. Anderson requested a copy of a letter from the area labor federation that was being discussed in an Operations Committee meeting, Mr. Hite replied that he thought she would have already received the letter from her 'Union buddies.' Response to Complainant's Amended Pre-Hearing Statement Re: Allegations of Retaliation Against Complainant (Nov. 4, 1997) at 9, II.C.S.d." (See Complainant's Opposition, at 14)

While Respondent may have admitted to said statement from Mr. Hite in its Response, Complainant is grasping at straws to think that this remark by Mr. Hite referring to Complainant's "Union buddies" conclusively equates into an understanding that she represents the OCAW. A Metro manager believing that Complainant is a friend of the union is a far cry from establishing that he believes Complainant to be given the right, authority, or direction to act as the OCAW's representative.

The affidavit of Marilyn Ferrari also addresses Complainant's assertion that Metro leaders regard Complainant as the authorized representative of the OCAW. (CX-2) Ms. Ferrari states when she attended a Denver City Council meeting on August 25, 1997, at which time her reappointment to the Denver Women's Commission was slated for action, Chairman Hackworth spoke of her and Complainant as follows:

> Yes, uh, one of the appointees on this list was an employee of the Metro Wastewater Reclamation District and, in my opinion, was part of the problem we had with that employee group which does not indicate she'd be a good member of the Women's Commission. Secondly, her most recent effort to support what I consider to be a maverick member of the Denver representative on the Metro sewer board, uh, who the EPA has charged with being guilty of misinformation and inaccurate information is not an appropriate action to be taken, and so I will not be supporting

> this, because I cannot support Ms. Ferrari. (CX-2, at 6)[6]

Complainant contends that this statement demonstrates that Chairman Hackworth views Complainant and the OCAW as "one single 'problem'." (See Complainant's Opposition, at 13) The undersigned disagrees with Complainant's characterization of Chairman Hackworth's statement. Chairman Hackworth clearly viewed Ms. Ferrari as part of a problem he saw with an employee group at Metro.

However, his statement regarding Ms. Ferrari's support of Complainant is a separate concern. It is indeed a stretch to construe his statements as indicating that Complainant, Ms. Ferrari, and OCAW represent "one single problem" as Complainant has asserted, and more specifically, that Chairman Hackworth or other Metro leaders have consistently viewed Complainant as the "authorized representative" of OCAW.

Furthermore, Complainant notes that at an April 2, 1997, public meeting held under the EPA to hear public comment on the Lowry Landfill plan, she made the following statement:

> I was appointed by the mayor of Denver to the Metro Wastewater Reclamation District specifically to represent the worker safety and health concerns, which, as you have heard, have been underrepresented to the board of directors. (CX-1, Attachment 1)

Complainant further notes that Counsel for Respondent, Joel Moritz, attended this meeting, but neither he nor any other Metro management ever attempted to contradict this description of Complainant as a representative of the workers at the Metro plant. (See Complainant's Opposition, at 13)

The failure of Respondent's Counsel or Metro management to refute Complainant's statement at the EPA meeting would appear unnecessary. Complainant stated that her appointment was

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[6]Ms. Ferrari states that this statement from Chairman Hackworth comes from her husband's videotape of the meeting on Channel 8 TV that same night.

clothed with merely the general responsibility of representing worker safety and health concerns, and does not prove her assertion that she was specifically appointed as an authorized representative of the OCAW. Thus, Complainant's statement during this EPA meeting, or the silence on the part of Metro management, does not lend support to her argument that Metro leaders have consistently regarded her as the "authorized representative" of OCAW 2-477.

It is apparent from both parties' arguments that nominees for appointment to the Metro Board are chosen with a motivation to represent different areas of interest, be it business interests, labor interests, citizen interests, or health interests. However, even if Complainant was appointed, based on her strong environmental and labor ties, to fill the position for interests, this does not equate into Complainant being an "authorized representative" of Metro employees.

Complainant contends that Mayor Wellington Webb's office "presented Ms. Anderson's nomination to the city council as the representative of Metro employees." However, Complainant has provided no documentation supporting this statement.

On a further note, Complainant asserts that if afforded the opportunity to engage in discovery, Complainant will uncover further evidence of her status as an "authorized representative"; specifically in the form of Denver Mayor Wellington Webb's deposition, from documents she has requested from Metro, or from Board leadership she intends to depose.[7]

First, the undersigned agrees with Respondent that the numerous documents relating to the Lowry Landfill which Complainant has pursued in discovery have no relevance to the present complaint or Complainant's standing assert to her complaint. Secondly, if Complainant's assertion that Mayor Wellington Webb's statements would prove Complainant's status as an authorized representative, then Complainant had ample opportunity to submit an affidavit or even correspondence from the mayor or a staff member indicating such with her Opposition.

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[7]Discovery in this matter had previously been halted pending a ruling by the undersigned on its scope. (Tr. at 107)

It seems more likely that any such documents concerning Complainant's "authorized representative" status would be possessed by Complainant, the OCAW, or the Mayor's office, and not with Metro. Thus, the undersigned rejects Complainant's argument that granting summary decision before she has been allowed discovery would be grossly unfair as without merit.

Finally, Complainant has also asserted that in analogous situations that arise outside of "whistleblower" law, but also involve worker safety, courts have construed terms like "authorized" and "representative" broadly. Specifically, in Kerr-McGee Coal Corp. v. Federal Mine Safety & Health Review Comm'n, 40 F.3d 1257 (D.C. Cir. 1994), the issue before the District of Columbia Circuit Court of Appeals was whether a non-elected labor organization could serve as a "miner's representative"[8] at a non-unionized mine under the Federal Mine Safety and Health Amendments Act of 1977 (the "Act").

Kerr-McGee owned and operated the non-unionized Jacobs Ranch Mine, and in July of 1990 seven miners employed at the mine designated the United Mine Workers of America ("UMWA") and two of its employees as their miners' representative. Kerr-McGee argued that neither the Act nor the regulations required it to recognize the UMWA as a miners' representative because the UMWA was neither a Jacobs Ranch Mine employee nor an official collective bargaining representative at the mine.

Of significance in Kerr-McGee was that the regulations also provide that after receiving notice that two or more miners have appointed a representative, the mine operator is required to post the designation on the mine's bulletin board. 30 C.F.R. §40.4. The Secretary acted under this provision of the Act in issuing a citation for Kerr-McGee's refusal to post the designation, and said citation was challenged by Kerr-McGee

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[8]In order to encourage miner awareness of health and safety concerns, Congress provided for miner participation in the inspection process. Section 103(f) of the Act confers "walkaround rights" on designated representatives of the miners: "Subject to regulations issued by the Secretary,...a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection..." 30 U.S.C. §813(f).

on appeal.

The court rejected Kerr-McGee's argument, noting that the Secretary defined "representative of miners" to include "[a]ny person or organization which represents two or more miners at a coal or other mine for purposes of the Act..." 30 C.F.R. §40.1, and that this definition, by specifically including "organizations," appears to contemplate that labor unions may serve as miners' representatives. Id. at 1261.

Furthermore, the Preamble to the Part 40 regulations expressly considers and rejects the notion that miner's representatives must be selected by a majority of the miners. Id. at 1261. Moreover, the legislative history of the Act shows that Congress considered miner education and participation important goals of the Act, but it does not suggest that Congress viewed third-party participation in safety issues as incompatible with those objectives. Id. at 1262. Thus, the Court held that the Secretary's interpretation of the Act to allow nonelected labor organizations to serve as a miners' representative as a nonunionized mine was reasonable, and Kerr-McGee's petition for review was denied.

The undersigned agrees with Respondent that Kerr-McGee is distinguishable from the present matter, and thus provides little support for Complainant's position. First, unlike the term at issue in the present case – "authorized representative" – the term at issue in Kerr-McGee – "miners' representative" – was defined in the regulations. The issue in Kerr-McGee was further clarified by the Preamble and legislative history of the Act. The specific definition of "miners' representative" and the notice requirement of such designation makes Kerr-McGee of little value in evaluating Complainant's status under the whistleblower statutes at issue in the present matter.

Complainant asserts that the Court in Kerr-McGee noted that non-employees who have expertise in areas of worker safety and health might play a unique role that an employee might not be able to fulfill. Id. at 1263. The undersigned does not doubt the Complainant has been actively involved in environmental and labor issues for many years. However, the central issue in the present motion for summary decision is not so much whether Complainant, as a non-employee of Metro, can

serve as the "authorized representative" of the OCAW or Metro employees.

Rather, the issue is whether Complainant has in fact been authorized by the OCAW to act as their representative on the Metro Board. In Kerr-McGee, there was no doubt that the requisite number of miners had designated the UMWA and two of its employees as their representative; whereas in the present case, such evidence is lacking to show that Complainant was the authorized representative of the OCAW.

Finally, Respondent is correct in its assertion that even under the Federal Mine Safety and Health Act, a person or organization cannot simply proclaim themselves the miners' representative, but rather the miners must make a designation of their representative and provide notice of their designee to the operator of the mine. Again, this notably distinguishes Kerr-McGee from the present situation, where there is no such official designation of Complainant as an "authorized representative", nor notice of such designation to Metro.

Therefore, based on the above discussion, it is determined that Kerr-McGee provides little support for Complainant's assertion that Complainant, under the applicable whistleblower statutes, is just the type of person that Congress intended to protect against retaliation for raising worker safety and environmental concerns.

Conclusion

The undersigned notes that Complainant has worked closely with the OCAW and many of its affiliates in the past, served as their Special Projects Coordinator from 1994 until early 1995, and still collaborates with the OCAW on issues such as the Lorry Landfill. Furthermore, the undersigned does not doubt that some of Complainant's actions have drawn expressions of gratitude from OCAW members and other employees not represented by OCAW.

In a letter addressed to Complainant, dated July 3, 1997, Robert E. Wages, President of the OCAW, states that: "First of all, I want to personally thank you for your persistent dedication in looking out for the interests of OCAW Local 2-477

and other workers in your capacity as a Director of the Metro Wastewater Reclamation Board." (RX-C)

Furthermore, in regards to Complainant's legal costs in this complaint, Mr. Wages states that: "we want to provide you with assistance in preparing for these hearings by making a direct contribution of $5,000" and enclosed a check payable to Complainant from the OCAW Defense Fund for said amount.

However, these expressions of gratitude, and even the contribution from OCAW to Complainant's legal fees, do not provide sufficient evidence or documentary support for Complainant's assertion that she is an "authorized representative" of OCAW. While Complainant may have received telephone calls from Metro employees in support of her position regarding the Lowry Landfill, (CX-1, at 5), this does not rectify the lack of any documentation supporting when and how Complainant became the "authorized representative" of the OCAW or Metro employees.

In conclusion, Complainant has failed to provide evidentiary support for her assertion that she is the "authorized representative" of the OCAW or Metro employees on the Metro Board of Directors. While she asserts that in "numerous discussions and meetings, the leadership of OCAW Local 2-477 directed Ms. Anderson to act as the representative of its members on the Metro Board", (Complainant's Opposition, at 16) Complainant has produced no correspondence between herself and the OCAW or the Mayor's office to support her asserted status, nor any documents supporting when and how she became an "authorized representative."

Even after reviewing the evidence in the light most favorable to Complainant, there is no genuine issue as to any material fact regarding Complainant's status as an "authorized representative" under the applicable statutes. Complainant has not offered sufficient evidence to support her standing to maintain this action, and thus Respondent is entitled to judgment as a matter of law. Accordingly, summary decision shall be granted in favor of Respondent in this matter, pursuant to 29 C.F.R. §18.41.

ORDER

Based on the above discussion, **IT IS HEREBY ORDERED** that Respondent's Motion for Summary Decision is **GRANTED**. Accordingly, the complaint in this matter is **DISMISSED**.

Entered this _____ day of February, 1998, at Long Beach, California.

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SAMUEL J. SMITH
Administrative Law Judge